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ONTARIO PUBLIC SCHOOL BOARDS' ASSOCIATION

SUBMISSION TO

THE LEGISLATIVE COMMITTEE ON RESOURCE DEVELOPMENT RESPECTING *BILL 40*

AMENDMENTS TO THE *LABOUR RELATIONS ACT* AND *EMPLOYMENT STANDARDS ACT*

Labour Relations Act Reform

August, 1992

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EXECUTIVE SUMMARY

The Ontario Public School Boards' Association (OPSBA) represents 93 public boards of education of all sizes and from all regions of the province. We are pleased to participate in the review of Bill 40, and submit our comments on the proposed legislation from the perspective of the essential public service our member boards provide.

Although the majority of school board employees fall under the School Boards and Teachers Collective Negotiations Act, the school system environment has many bargaining units which are governed by the Ontario Labour Relations Act. There are also non-unionized employees.

For the education system, Bill 40 provides amendments in many areas which would increase the likelihood that schools are frequently closed, with potentially serious disruption to the education of young people.

Given the central nature of quality education to the social and economic well-being of Ontarians (which is cited as one of the primary reasons for Bill 40), the potential for such disruption must be minimized.

OPSBA intends its submission to be of practical assistance to the government. Therefore, we have concentrated on the following major proposals:

I. Replacement Workers

1. Disruption of the Ontario school system should be avoided. Thus, the proposed prohibition on the use of **REPLACEMENT WORKERS** should not operate where it would cause: (i) the layoff or termination of a significant number of non-striking employees in relation to the number of striking employees; or (ii) the closing of schools.

2. In any event, the replacement worker prohibition in Section 73 should be clarified to provide that any management personnel of a school board, **wherever employed in the school board**, can perform the work of striking bargaining unit employees in order to ensure that schools remain open.

3. A regular classroom teacher should be able to assume the classroom duties of a striking occasional (substitute) teacher.

4. The prohibition in Section 73 should not operate unless at least 60% of the bargaining unit is on strike. As the legislation is now proposed, a minority of members of the bargaining unit can go on strike regardless of what the larger union wishes at that time.

5. Our communities are encouraged to work in and for their schools. Parents and other volunteers should be permitted to assist in schools without interference of the prohibition in Section 73.1.

6. Bill 40 should clearly state that "specified replacement workers" may be used by the Board to ensure that schools remain open, notwithstanding a strike of custodial or maintenance employees. If such replacement workers refuse to perform such work, Boards should be free to use other qualified personnel including contractors.

II. Combining Bargaining Units

The power to combine bargaining units should be available where employees are represented in different bargaining units by locals of the same trade union.

III. Contracting In

Boards should be free to "contract in" dietary and cleaning services at community rates. Contracting of such services remains the only viable option to keep costs under control.

IV. Imposing the First Collective Agreement

First collective agreement arbitration should only be imposed as provided in the current Act and, in addition, when a strike has continued for more than 30 days. The form of arbitration should be final offer selection to encourage realistic and good faith bargaining.

V. The Release of Probationary Employees

Employers ought to be given the right to negotiate the lesser standard for terminating probationary employees before the just cause clause is deemed to be part of each collective agreement.

VI. Application of the Charter

Section 49.1 (the application of the Charter to collective agreements) should be modified to ensure that existing mandatory retirement provisions which comply with the Ontario Human Rights Code are not invalidated or threatened in any way.

VII. Access to School Property

Union organizers and picketers should not have a right of access to schools and other school board property.

We have identified serious concerns regarding the proposed Labour Relations Act amendments and the implications to boards of education in Ontario.

OPSBA believes that the majority of the proposals in Bill 40 will not enhance labour peace or work place harmony. They will, in fact, have the effect of providing less responsibility for parties to resolve their differences and adapt to change, and will create more third party intervention and determinations.

In the delivery of education - an essential public service - boards of education are faced with unique challenges as employers, and in balancing the rights and needs of students, employees and the public. The school environment is different than many sectors governed by the Ontario Labour Relations Act. This must be recognized in any amendments.

We remain available, at any time, to further assist the Government regarding the issues raised by Bill 40.

INTRODUCTION

The Ontario Public School Boards' Association represents 93 public boards of education of all sizes and from all regions of the province.

Statement of Mission and Beliefs

> **OPSBA's mission is to promote and enhance public education by assisting member boards in fulfilling their mandates, by developing effective partnerships with other groups interested in public education, and by providing a strong and effective voice speaking on behalf of public education in Ontario.**

OPSBA believes that:

> **The role of public education is to provide every individual with equal access to education opportunities, regardless of gender, race, religion, ethnic origin, disability, and place of residence in Ontario, in English or in French, consistent with provisions of the Charter of Rights and Freedoms.**

Excellence in education is achieved through:

- the promotion of high standards of individual achievement;
- the provision of the basic skills required for active, compassionate participation in family, community, province, nation and in a global society;
- the cultivation of a love of learning;
- a recognition of the value of diversity among learners and communities;
- a willingness to explore creative educational alternatives.

Locally elected school boards play a key role in ensuring that schools remain responsive to both the program requirements and the resource limitations of the communities they serve.

Excellence in the public school system depends on effective partnerships throughout the entire community. The public school system is ultimately accountable to the community it serves. In keeping with the duties prescribed for boards of education and teachers under the Education Act and regulations, and the goals of education espoused by the Ministry of Education, boards of education are committed to provide each of the students it serves with the best education possible. The kind of education public school boards provide respects individual differences in students and aims to help individual learners to achieve their potential.

Education is a basic function of government. The substantial tax support it receives means that education is, and should be, regarded as an essential service. With public funding, public and separate school boards have a monopoly to provide educational services. Legislative or governmental action, which would disrupt the provision of educational services in Ontario, will discontinue the tenet of governance in Ontario.

In the area of labour relations and under the classification of "the broader public sector", a large number of the employees in individual boards of education are unionized and governed by the Ontario Labour Relations Act, or they are non-unionized. However, we are also governed by the School Boards and Teachers Collective Negotiations Act (Bill 100) and the Education Act and Regulations which govern teachers in accordance with Section 230 of the Education Act. These two labour acts are very different in many ways.

For example, the School Boards and Teachers Collective Negotiations Act requires the Education Relations Commission to advise the Lieutenant Governor in Council when, in its opinion, the continuation of a teacher's strike places in jeopardy the successful completion of study by the students affected (Section 61(h)). On the basis of such advice the Cabinet can proceed to order an end the strike or lock-out. The placing in jeopardy of the successful completion of study by the students affected by a strike by teachers has a remedy that does not exist in the Ontario Labour Relations Act but which is just as serious a concern no matter which group of employees is on strike.

Our environment consists of both multi-bargaining units and non-unionized employees. Bargaining units are often represented by a very diverse group of unions. Bill 40 proposes amendments in many areas which would increase the likelihood that a school system could be closed down more frequently, without regard for students (e.g. replacement workers).

The following is provided by the Ontario Public School Boards' Association to respond to the issues raised in Bill 40, Amendments to the Labour Relations Act and the Employment Standards Act. OPSBA welcomes the opportunity to respond and provide input, as it relates to public boards of education in the province of Ontario. This submission will address some areas of Bill 40 which we believe will have a direct impact on public education. We remain available at any time to discuss the issues we raise.

OPSBA believes that the Labour Relations Act has generally served both boards of education and their employees well. The concepts which the Act establishes, of resolution by the parties to a collective agreement, strengthens the bargaining relationship. The current provisions, which provide for third party intervention, when the parties believe it to be necessary, has also provided the mechanisms for dispute resolution. We believe, strongly, that parties to a bargaining relationship should be free to negotiate terms in a collective agreement without third party intervention or legislative amendments.

Labour legislation, including but not limited to, issues such as human rights, pay equity, health and safety, employment standards, pensions, etc., supplement the current provisions of the Labour Relations Act in the method and determination of working conditions for employees. We believe that the current relationship between boards of education and their employees, whether in a unionized or non-unionized setting, is supported by the relationships which have resulted from direct negotiations and/or consultation.

Where there exists an identified need for legislative change or other means of assistance requiring government intervention, it is necessary to evaluate the impact of the amendments. We are significant stakeholders in the Government's labour law reform consultation process because of the size and complexity of the organizations we represent, and because we are engaged in providing an essential public service.

IMPACT OF BILL 40

I. REPLACEMENT WORKERS (SECTIONS 73.1 AND 73.2)

It is not our intention to debate with the proponents of the Bill the underlying principles which would prevent a school board from endeavouring to continue operations when a strike affects a portion of its organization. While we do not support the Government's determination to ban operations during a strike, these submissions will instead focus on how, even accepting the basic principles of the legislation, improvements must be made in order that schools do not experience excessive disruption because of this fundamental change to the Labour Relations Act.

1) Closing Schools Because of Strikes

The Government's proposal to ban all but the "managerial and supervisory employees" in a school affected by a strike from performing services in a struck bargaining unit greatly increases the risk that a board-wide closure of schools could occur as a result of a strike by a few employees. In any school board we have, or potentially have, the following possible configuration of separate bargaining units.

- elementary teachers (including continuing education teachers)) covered by the School
- secondary teachers) Boards and Teachers
- secondary continuing education teachers) Collective Negotiations Act
- elementary occasional teachers
- secondary occasional teachers
- continuing education instructors
- teacher aides
- maintenance & custodial staff
- professional services groups (psychologists, attendance counsellors, social workers, etc.)
- technicians
- school clerical staff
- bus drivers
- central office clerical staff
- bus drivers
- skilled trades

Boards of education have multi-bargaining units emphasizing the interdependency of each of the collective bargaining relationships within the organization as far as the operation of the board is concerned.

Such multi-union and multi-unit operations create special problems when a labour dispute occurs. A strike by very few employees can impact throughout the entire school board organization and in some situations can, in fact, require the closure of all school operations.

Obviously, this should be avoided if possible. No one today would deny that the provision of education is a basic function of government. This recognition and the substantial tax support which this recognition implies means that education should be, and is regarded as, an essential service. We submit that it continues to be a tenet of government in Ontario that any proposed legislative or governmental action which disrupts the provision of educational services in the province should not be encouraged.

The balkanization of school board bargaining units is further complicated by the very complex bargaining structure which has evolved in the Ontario school system. Across the province school board employees are covered by three separate systems of labour governance (the Ontario Labour Relations Act, the School Boards and Teachers Collective Negotiations Act and the Education Act and Regulations). In Metro Toronto, the Municipality of Metropolitan Toronto Act is superimposed on the School Boards and Teachers Collective Negotiations Act with respect to teacher bargaining. This mix of statutory provisions together with the proliferation of bargaining units has led to a balkanization within most school boards so that a labour disruption in one bargaining unit may have a devastating impact throughout the entire school board.

Therefore, in order to minimize this impact, the prohibition against having persons perform striking employees' work should be modified to ensure that the non-performance of striking employees' work will not cause a layoff of a significant number of employees, or cause a closure of a school or schools. In other words, the prohibition contained in Section 73.1 should not operate where the inability to utilize replacement workers could cause the layoff or termination of a significant number of non-striking employees or would lead to the closure of a school or schools.

Many examples exist to prove the point. For example, a strike of school bus drivers would obviously disrupt the transportation system of any school board, particularly rural boards, and also urban boards where pupils are bused daily to special schools because of particular learning needs.

Should not a board be able to arrange alternative transportation? Under the proposed legislation it could not do so. It is even doubtful whether a Board could organize parent car pools. Any action by the school board to facilitate the attendance of the pupils by alternate means of transportation would be contrary to the Act. We are talking in these cases of many pupils who because of disabilities are not able to take advantage of municipal transit systems. In any event, in most of the province such systems do not exist or would not provide a service to the schools in question.

A second and equally valid example would of course occur if persons responsible for maintaining heating systems were on strike. Presumably, the Principal or Vice-Principal of the school would not be permitted by law to operate the heating equipment. The managers of the striking employees who might be so trained and thus permitted by law would not under the proposed legislation be able to perform the required functions because they are not normally employed at the struck location (i.e., the school). Moreover, such managers would not be in sufficient numbers to staff each and every school facility. Thus, being unable to utilize other non-striking workers or to engage temporarily contractors to provide such minimal service could force a closure of the entire school system.

It should be noted that it is not only the pupils who are affected. Other employees, not involved in the labour dispute, who could far outnumber the number of striking employees would be laid off presumably without compensation or benefits while the bargaining parties attempted to work out their difficulties. These ramifications of a multi-bargaining unit employment setting like school boards require special attention under the legislation which they have not received.

The proposed prohibition on the use of replacement workers should not operate where such prohibition would cause:

(i) the layoff or termination of a significant number of non-striking employees in relation to the number of striking employees; or

(ii) the closing of a school or schools.

2) Management Personnel

The way the legislation is currently drafted, managers from the school board central office could not attend at a school and perform the functions of striking employees. The proposed legislation is excessively narrow in the use of management personnel, and we would propose that it should be broadened to permit any management personnel of a school board wherever employed being utilized to ensure that schools remain open during a strike of some of the board's employees.

c) Only Managerial Employees can Perform the Work of the Striking Bargaining Unit Employees

This may cause unintended effects which could have dramatic consequences on the ability to provide services to some pupils.

For example, when a teacher is absent from school, it is customary for the teacher to be replaced by a "supply" or substitute teacher (referred to under the legislation as an "occasional teacher"). Unlike regular classroom teachers, occasional teachers are covered by the Labour Relations Act and not by the School Boards and Teachers Collective Negotiations Act. Consequently, if the occasional teachers were on strike under the Labour Relations Act, the proposed legislation might be interpreted to prohibit the boards from utilizing regular classroom teachers to teach in the class vacated by the striking occasional teacher. As the regular classroom teacher would not be considered "a managerial employee", such teacher would not be able to teach the pupils of the occasional teacher.

Secondly, even if that regular classroom teacher could be utilized, the proposed legislation requires that the board obtain the consent of that teacher to perform the work of the striking bargaining unit employee. Most occasional teachers are represented by the same Union (e.g., The Ontario Secondary School Teachers' Federation, or the Ontario Public School Teachers' Federation) which represents the regular classroom teachers. It is not difficult to imagine that there would be pressure exerted by the Union on the regular classroom teacher not to perform the work of the striking occasional teacher.

Under the regular classroom teacher collective agreement, teacher unions have generally agreed that a regular classroom teacher will fill in for an absent colleague if an occasional teacher is not available or if the absence is short term. The proposed legislation by giving the regular classroom teacher the right to refuse such an assignment is most unfairly interfering with current practice. We recommend that the right of a board to require a regular classroom teacher to fill in for a striking occasional teacher should not be altered.

This problem should not be underestimated. The boards employ a substantial number of occasional teachers who are called to substitute for regular classroom teachers absent from work for many reasons: medical or Union leave, bereavement leave, religious holidays, pregnancy or parental leave, or any other leave with or without pay provided for in their collective agreements. With the advent of pregnancy and parental leave, as many as 10% of teaching positions in any school could be occupied by occasional teachers, many of whom are on long-term teaching assignments. Hence, 10% of the school population would be without teachers even though regular classroom teachers might be ready and available to step in. Surely, this cannot be the Government's intent in Bill 40.

We propose that a regular teacher should be able to perform the duties of a striking occasional teacher.

4) Lawful Strike By a very few number of Employees

It should also be recognized that the prohibition against the use of replacement workers occurs if a lawful strike by a very few number of employees is occuring.

For example, the Union and the Employer may still be negotiating and the Union may for very good reason defer exercising its strike rights. Nonetheless, if two or three employees out of the bargaining unit decide, notwithstanding the Union, to strike, the employer is immediately powerless to do anything about it. Those employees in the bargaining unit who are not striking are immediately prevented from continuing to work under the legislation. This is a grotesque result and yet it could happen very easily. What it does demonstrate is the difficulty of drafting broad prohibitions in novel legislation which has unintended effects.

We ask the Committee to consider alterations in the legislation to ensure that this does not occur. For example, the prohibition in Section 73.1 should not operate unless at least 60% of the bargaining unit is on strike. That percentage is the minimum percentage of bargaining unit employees who must vote for the strike in order for the Section 73 prohibition to be operative.

5. Volunteers

Under the legislation, volunteers cannot be used to perform the work of striking employees.

We have already suggested the types of problems which might occur if the bus drivers of a board were to go on strike and the board attempted to arrange for parent volunteers to perform the necessary chauffeuring functions to deliver their children to school.

Moreover, in the modern era of working parents, it is absolutely essential that the daycare function of schools be recognized. Therefore, it is equally necessary that volunteers be permitted in schools which are subject to a strike or lockout to permit at minimum, needed custodial care for children during the normal working hours of their parents.

6) Specified Replacement Workers (Section 73.02(3)(a))

School boards are concerned, notwithstanding Section 73.02(3), that a strike by school custodial personnel who are responsible for maintaining basic hygienic and sanitary standards in schools could force the closure of schools if the strike continued for a lengthy period. Boards must be able to divert other workers or engage on a temporary basis contractors to maintain such essential services. It is not at all clear that the specified replacements workers exception would apply to the conditions caused by unclean classroom or lavatory facilities. This should not be a matter for dispute with the Union or before the Labour Board. The legislation should clearly state that school boards have either the right to use specified replacement workers or the right to retain contractors in order to keep the schools open for students during a work stoppage and fit for occupation by pupils and teachers.

Moreover, boards are concerned that under Subsection 8 of Section 73.2 striking employees have the power to withhold their consent or agreement to work as specified replacement workers even if the Union so consents. The legislation does not address what the board may do in those circumstances. In fact, a close reading of Section 73.2(9) does not indicate that the failure of the striking employees to agree to work will permit the board to engage contractors or to use other qualified personnel in the board's employ. The legislation should be clarified to confirm that boards may use qualified personnel in such circumstances.

II. COMBINING BARGAINING UNITS (SECTION 7)

School boards support the granting of powers to the Ontario Labour Relations Board to allow existing bargaining units to be combined. However, boards are concerned that the granting of this power will only benefit trade unions and will not allow employers to seek the enlarged bargaining units because of the form of trade union organization.

At the present time, each local of a trade union is considered a different trade union and, hence, any application by a school board to request the Labour Board to consider combining, for example, two locals of CUPE would probably be rejected by the Labour Board on the basis that each local is a separate trade union. Section 7(1) indicates that the combining of bargaining units can only occur where the employees in each of the bargaining units are represented by the same trade union.

To make this provision effective, the Labour Board should have the power to combine bargaining units where employees are either represented by the same trade union or by locals of the same trade union.

III. "CONTRACTING IN" IN THE CONTRACT SERVICE SECTOR (SECTION 64.2)

Many boards contract for dietary and cleaning services. We are therefore concerned with section 64.2 which would extend the successor right provisions of s.64 of the Labour Relations Act to the contract service sector. As we understand the proposal, if a board were to take over from a contractor the provision of cleaning or dietary services previously performed by the contractor, the board would inherit all the terms and conditions of the collective agreement between the contractor and its union or unions. Boards are not troubled by the proposal to maintain employment relationships or to credit past service with the contractor employer. Nor are boards opposed to protecting the bargaining rights of the contractor's trade union in respect of the work previously done by the contractor for the board.

We are, however, concerned that the board would by law inherit the terms and conditions of the collective agreement agreed to by the contractor. There is nothing preventing the contractor, either in the final year of its contract with the board, or after receiving notice of termination of its service contract from the board, to agreeing to completely unacceptable provisions which the board would inherit by operation of s.64(2). Indeed, the imposition of any collective agreement negotiated by a private sector employer operating an entirely different business would create intolerable conflict within the complex bargaining structure of the board.

The situation is not at all analogous to the purchase and sale of business. In that case, the purchaser has the opportunity to evaluate the collective agreements which the law requires that it inherit and to determine whether it will purchase the business on those terms. There is a mutual interest on the part of the vendor and purchaser to ensure that the terms of those collective agreements are not unreasonable or onerous.

More fundamentally, a board should be free to contract for food and cleaning services at market rates established in their respective communities. One of the principle reasons for bringing in a specialist contractor is the anticipated realistic setting of wage and service standards. In these days of cost consciousness and restraint school boards should be free to get the required service at competitive rates.

Bill 40 would prevent the school boards from shedding an unrealistic and high cost contractor.

IV. IMPOSING THE FIRST COLLECTIVE AGREEMENT (SECTION 4.6)

Bill 40 would expand the right to first contract arbitration in cases where the parties have been in a legal strike or a lockout position for more than 30 days without being able to reach a collective agreement. The Act now only permits first contract arbitration where some "fault" exists on the part of one of the negotiating parties.

The proposal, on the other hand, would permit first contract arbitration by the mere passage of time, i.e., being in a position to strike for at least 30 days. If the parties are unable to resolve their differences after a full strike has occurred for at least 30 days, one can appreciate the desirability of bringing the dispute to an end through a system like arbitration. School boards have no difficulty with that proposition.

Further, the boards would recommend that any dispute resolution system should encourage bargaining, not detract from bargaining, an objective with which the Government's Discussion Paper on Labour Act Reform appeared to agree. Therefore, the school boards recommend that the type of arbitration which should be imposed would be final offer selection. Bill 40 permits this only if both parties agree. This system of arbitration is permitted under the School Boards and Teachers Collective Negotiations Act. Its advantage is that it encourages the parties to bargain and discourages abdication of bargaining responsibility to third party resolution. We believe its mandatory extension into first contract disputes would encourage its use in other situations voluntarily.

V. THE RELEASE OF PROBATIONARY EMPLOYEES (SECTION 43.1)

Bill 40 specifies that every collective agreement is deemed to provide that no employee shall be discharged or otherwise disciplined without just cause. The parties, however, may agree to establish a probationary period for new employees and, a lower standard than just cause for discharging such employees may apply during that period.

Most collective agreements now provide in some fashion for the release of probationary employees without meeting the just cause test. It is not at all clear that such provisions will now be effective unless they explicitly provide a lesser standard for discharging probationary employees during the probationary period.

The parties should be given the opportunity to negotiate the lesser standard before the just cause clause is deemed to be in their agreement. By not providing for a transitional provision Bill 40 will insert in every collective agreement the deemed just cause clause. We would prefer that the legislation provide that the renewal collective agreement would provide such a clause if in the renewal negotiations the parties do not agree to a lesser standard for discharging employees.

VI. APPLICATION OF THE CHARTER (SECTION 49.1)

Section 49.1 provides that a collective agreement must not discriminate against any person if the discrimination is contrary to the Ontario Human Rights Code or the Charter of Rights and Freedoms. We are concerned that the present mandatory retirement provisions in place in school boards may now be threatened, perhaps inadvertently, by this clause. We would suggest that s.49.1 be clarified to provide that it is not intended to jeopardize or invalidate any existing mandatory retirement provisions which comply with the Ontario Human Rights Code.

VII. ACCESS TO SCHOOL PROPERTY (SECTION 11.1)

In Section 11.1 there is an intention to provide a right to engage in lawful organizing activity on premises "to which the public normally has access". A companion proposal would permit picketing on such property.

School boards recognize that these Bill 40 proposals are directed to shopping malls and industrial parks where extensive third party property rights might interfere with reasonable organizing and other union activity. Boards are concerned, on the other hand, that school property could be regarded as property "to which the public normally has access". We request that clarifying amendments be introduced to insure that these provisions do not extend to schools and other board property to which the public may have been granted access.

CONCLUSIONS

As our submission indicates, we have identified very serious concerns regarding the proposed Labour Relations Act Amendments and the implications to boards of education in this province.

In summary, we believe that the majority of proposals will not enhance labour peace or work place harmony. They will have the effect of providing for less responsibility for the parties to resolve their own differences, adapt to change, and create more third party intervention and determinations.

Boards of education in the Province of Ontario are faced with unique challenges as employers and balancing the rights and needs of students, employees, and the public. Our comments come from the perspective of the essential service we provide.

We appreciate the opportunity to provide input on this extremely important issue and its impact on education in Ontario.

We recognize and have attempted to demonstrate that our environment is very different than many sectors governed by the Ontario Labour Relations Act. As an essential service to future generations in Canada, we remain available, at any time, to participate and further assist the government concerning the issues raised in Bill 40.